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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 316

In the Matter

of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Debtor.

CHARLES W. MULCAHY, Trustee of Boston and Providence Railroad Corporation,

Petitioner.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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THE COURT PRESS, 130 Cedar Street, N. Y. C.

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To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The undersigned, on behalf of Charles W. Mulcahy, Trustee of the property of the Boston and Providence Railroad Corporation, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered on June 29, 1948, affirming a Consummation Order and Final Decree entered by the United States District Court of Connecticut in the above railroad reorganization proceedings.

Opinion Below.

There was no opinion of the District Court on the Consummation Order and Final Decree appealed from. The opinion of the Circuit Court of Appeals (R. 209-219) is not yet officially reported.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on June 29, 1948 (R. 220). Jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C. Title 28, sec. 347; 28 U. S. C. A., sec. 347).

Questions Presented.

Whether a District Court reorganizing a debtor railroad[1] under Section 77 of the Bankruptcy Act can, by its Consummation Order and Final Decree discharging the Bankruptcy Trustees and transferring the property of the debtor to a Reorganized Company free from the custody and control of the Court, deal with the property of a rejected lessor[2] not in reorganization in said Court, but whose property had

[1] Actually four railroads were being reorganized in the same proceedings under Section 77 in the United States District Court for the District of Connecticut. The Principal Debtor was The New York, New Haven and Hartford Railroad Company, and the Old Colony Railroad Company and two other railroads were "Secondary Debtors" in the same proceedings.

[2] The Lessor, Boston and Providence Railroad Corporation, originally leased its lines to Old Colony which in turn leased its own and the leased lines to New Haven. Boston and Providence at no time has been in reorganization in the District Court of Connecticut, but is in reorganization in the District Court of Massachusetts.

been operated by said Court through its debtor's Trustees during the bankruptcy proceedings under Section 77 (c) (6) of the Bankruptcy Act, so as to:

(1) authorize the lessee's trustees to cease operating the lessor's lines without a certificate from the Interstate Commerce Commission under Section 1 (18) of the Interstate Commerce Act;

(2) authorize a Reorganized Company emerging from the Plan to take over operations of the lessor's lines without a certificate from the Interstate Commerce Commission under Section 5 (2) of the Interstate Commerce Act authorizing such operation and approving the terms and conditions thereof; and

(3) reserve to itself jurisdiction to pass on claims between the lessor and the Reorganized Company arising out of operation of the lessor's lines by the Reorganized Company *after the effective date of the final decree* putting into effect the Reorganization Plan of the lessee.

Statutes Involved.

The statutes involved are Section 77 of the Bankruptcy Act and Sections 1 (18) and 5 (2) of the Interstate Commerce Act, the applicable portions of which are set forth in the Appendix.

Statement.

The Boston and Providence Railroad Corporation (hereinafter referred to as Boston and Providence) is the owner of a railroad running between Boston, Massachusetts and Providence, Rhode Island. In

1888, it leased its properties for a term of ninety-nine years to Old Colony Railroad Company (hereinafter referred to as Old Colony). In 1893, Old Colony in turn leased to New York, New Haven and Hartford Railroad Company (hereinafter referred to as New Haven) for a term of ninety-nine years its own lines, including the leasehold interest that it held in the Boston and Providence properties. New Haven operated all three roads, until, on October 23, 1935, it was put into reorganization under Section 77 of the Bankruptcy Act (R. 5) in the United States District Court for the District of Connecticut (hereinafter referred to as the Connecticut Court). New Haven is commonly referred to in these proceedings as the Principal Debtor. On June 1, 1936, the Connecticut Court directed the New Haven Trustees to reject the Old Colony lease, and this was done; and, on June 3, 1936, Old Colony also was put into reorganization in the Connecticut Court under said Section 77 of the Bankruptcy Act (R. 20). It became a Secondary Debtor in the New Haven proceedings; and on June 18, 1936 the same persons who had been appointed Trustees of New Haven were also appointed Trustees of Old Colony (R. 23). Subsequently two other railroads, Hartford and Connecticut Western Railroad Company and Providence, Warren and Bristol Railroad Company were put in reorganization and also became Secondary Debtors in these proceedings.

On July 19, 1938, the Connecticut Court (Order 217, R. 58) directed the Old Colony Trustees to reject the Boston and Providence lease. Paragraph 5 of said order provided:

"5. Pending further order of Court the operation of the property of Boston and Providence for

the account of that corporation shall be continued pursuant to subdivision (c) (6) of Sec. 77 of the Bankruptcy Act, and since the Old Colony Railroad Company, as lessee of Boston and Providence, and likewise the Old Colony Trustees, are wholly without any operating organization, the operation of Boston and Providence properties shall be conducted by the New Haven Trustees in behalf and for the account of the Old Colony estate but without expense to the New Haven estate" (R. 60).

On August 5, 1938, the Boston and Providence was put into reorganization in the United States District Court for the District of Massachusetts (R. 61). By order entered August 22, 1938, Bentley W. Warren and appellant were appointed Trustees of the estate of the Boston and Providence. Bentley W. Warren died on February 27, 1947 and since that date appellant has continued as sole Trustee.

The New Haven Trustees operated the Boston and Providence properties under said Order No. 217 from July 19, 1938 until September 18, 1947, being the consummation date fixed in accordance with the Consummation Order and Final Decree herein appealed from (R. 130). From time to time they have filed in the Connecticut Court reports of the results of their operation, and said reports, covering the period from June 4, 1936 (the day following the filing of Old Colony's petition for reorganization) to December 31, 1946, purport to show losses resulting from the operation of the Boston and Providence properties in the net aggregate amount of $12,446,512.62 (R. 206). Claims for these losses have been asserted by the New Haven Trustees as prior lien claims against

the estate of the Boston and Providence. None of said claims has been finally adjudicated against the Boston and Providence, its Trustee, or its property (R. 205).

The validity and amount of said claims for the period from June 4, 1936 to December 31, 1939, as well as the jurisdiction of the Connecticut Court to adjudicate them and to impose a lien therefor on the property of the Boston and Providence, were contested by the Boston and Providence Trustees in the Connecticut Court. On appeal to the Circuit Court of Appeals for the Second Circuit the jurisdiction of the Connecticut Court was upheld, but the case was remanded for further proceedings on the merits. *Warren* v. *Palmer,* 108 F. 2d 164. On *certiorari* to this Court the decision on the jurisdictional question was affirmed, *Warren* v. *Palmer,* 310 U. S. 132. Hearings were then recommenced in the Connecticut Court on the merits, but before such hearings were concluded further trial was suspended in accordance with a stipulation of the parties which was approved by both the Connecticut and Massachusetts Courts (R. 82-88). The approval and confirmation by the Connecticut Court of the New Haven plan of reorganization was affirmed upon appeal by the Circuit Court of Appeals for the Second Circuit in *Old Colony Bondholders* v. *New York, New Haven and Hartford Railroad Company,* 161 F. 2d 413. Petitions for *certiorari* were denied by the Supreme Court on June 23, 1947, 331 U. S. 859.

Under the terms of the plan of reorganization for the New Haven and other debtors in the Connecticut Court, a new corporation or "Reorganized Company"

was to emerge from the reorganization with all the powers, franchises and properties of said four debtors; and said plan provided an option under which the Reorganization Committee might carry out the plan by using the Principal Debtor with appropriate amendments to its charter instead of causing a new corporation to be formed for that purpose (R. 132). The Committee exercised the option (R. 116). Upon petition of the Reorganization Committee, the Connecticut Court, on September 11, 1947, entered its Consummation Order and Final Decree (Order No. 1007, R. 114) whereby, as of the consummation date, which was later fixed pursuant to said order and decree as September 18, 1947, the Bankruptcy Trustees were discharged; all of the property, business and affairs of said Debtors were transferred to the Reorganized Company; and, with certain exceptions specified in said order and decree, the reorganization proceedings were wholly terminated and closed (R. 120, 129).

In Paragraph XI-2 (O) of Order No. 1007 referred to above, the Connecticut Court purported to reserve jurisdiction of claims arising out of the operation of the Boston and Providence properties by the Reorganized Company after the consummation date (R. 129). The Reorganized Company has been conducting such operations since the consummation date under claimed authority of Section 77 (c) (6) of the Bankruptcy Act; and its authority to do so, as well as the jurisdiction of the Connecticut Court to adjudicate claims resulting therefrom, have been upheld in the decision of the Court below.

Under the reciprocal provisions of the New Haven plan (R. 94) and of the Boston and Providence plan (R. 89), the Reorganized New Haven would acquire

the properties of the Boston and Providence in the event of confirmation of the Boston and Providence plan, but, except in that event, no provision is made in either of said plans for operation of the Boston and Providence properties, and no order has been made by the Commission relative thereto. Between the date of the entry of the Final Decree of the Connecticut Court and the argument of the appeal before the Circuit Court, the Massachusetts Court disapproved the Boston and Providence plan and referred the same back to the Commission; and this fact was called to the attention of the Court below at the argument.

The Trustee of the Boston and Providence appealed from said Consummation Order and Final Decree of the Connecticut Court (R. 187-189). The Circuit Court of Appeals affirmed the Consummation Order and Final Decree; and this is the decision which is sought to be reviewed here.

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred:

(1) In holding that, by the Final Decree appealed from, the District Court could authorize the New Haven-Old Colony Trustees to cease operating the Boston and Providence lines without authority from the Interstate Commerce Commission under Section 1 (18) of the Interstate Commerce Act.

(2) In holding that, by the Final Decree appealed from, the District Court could authorize and empower the Reorganized Company to take over the operation of Boston and Providence lines without authority and approval from the Interstate Com-

merce Commission under Section 5 (2) of the Interstate Commerce Act, and without a further determination by that Commission under said Section 5 (2) as to what constituted proper terms and conditions for such operation.

(3) In holding that, after the effective date of the Final Decree appealed from, the Reorganized Company was the "lessee" of the Boston and Providence lines within the meaning of Section 77 (c) (6) of the Bankruptcy Act.

(4) In affirming Paragraph XI-2 (O) of the Final Decree appealed from whereby the Connecticut Court purported to reserve jurisdiction to pass upon claims by and between the Reorganized Company and the Boston and Providence, or its Trustee, arising out of the operation of the Boston and Providence lines by the Reorganized Company after September 18, 1947, the consummation date of the New Haven Plan.

Reasons for Granting the Writ.

The decision below wrongly decides questions of Federal law of major importance to the efficient administration of the Interstate Commerce Act and of railroad reorganizations under the Bankruptcy Act.

1. This case directly involves the respective powers of the Interstate Commerce Commission and of the District Court of Connecticut over the future operation of the lines of a former lessor railroad, Boston and Providence, *after the termination of* the bankruptcy reorganization proceedings of its lessee in the Connecticut Court, during which proceedings the lessee rejected the Boston and Providence lease, but continued through its Bankruptcy Trustees to oper-

ate the leased line under Section 77 (c) (6) of the Bankruptcy Act. Despite the fact that the Boston and Providence was at no time in reorganization in the Connecticut Court, the Court below held that the Connecticut Court had power, by its Final Decree and Consummation Order putting into effect the lessee's plan of reorganization, to

> authorize its debtor lessee's trustees, without Commission approval, to cease operating the rejected leased lines, and discharge said trustees;
>
> authorize the new company emerging from the reorganization proceedings to operate the rejected leased lines without either approval from the Commission as to the operation itself, or a determination by the Commission as to what constituted proper terms and conditions therefor; and
>
> reserve to itself jurisdiction to pass upon claims resulting from such future operation of the lessor's lines by the Reorganized Company.

Stated in another form, the decision below decides that the provisions of Section 77 (c) (6) of the Bankruptcy Act survive the termination of the lessee's bankruptcy proceedings so that a new company emerging from said proceedings can, without any determination or approval of the Interstate Commerce Commission, continue the same operation of the lessor's property as had the lessee's Bankruptcy Trustees during those proceedings; and that future claims arising from such operation continue to be subject to the jurisdiction of the Bankruptcy Court.

Apparently the majority of the Court below erroneously assumed that the Connecticut Court was re-

organizing the Boston and Providence instead of merely operating its lines temporarily through the lessee's Bankruptcy Trustees under the exceptional circumstances of Section 77 (c) (6). That opinion (R. 214) says:

> "However, the assumption that the reorganization proceedings have been terminated with respect to the lines of the Boston and Providence is contrary to the fact. Those lines will continue to be operated by the 'lessee' subject to such orders as the bankruptcy court may hereafter make pursuant to the jurisdiction reserved by the order on appeal."

The dissenting opinion (R. 217) says of this:

> "That statement necessarily rests on the implied proposition that the court below has had within its jurisdiction the 'reorganization with respect to the lines of the B & P,' and has not yet 'terminated' that jurisdiction. But that proposition is contrary to fact: The 'reorganization' with respect to the lines of the B & P has never been within that court's jurisdiction. It has been, and is now, in the exclusive jurisdiction of the federal district court for the District of Massachusetts. The court below therefore had no authority to deal with the reorganization of the B & P or with any sale or other disposition of its properties."

It is entirely clear from the decree itself that, following the consummation date, the Court had no power or control over the actual operation of the Reorganized Company, or of the lines of petitioner by the

Reorganized Company. The decree here in question "discharged" the Trustees (R. 123) and directed them to turn over all of the properties of the Principal and Secondary Debtors to the Reorganized Company (R. 120). Paragraph VII-2 of the decree (R. 123) recites:

> ". . . From and after the consummation date the right, title and interest of the Reorganized Company and its possession, operation and control of all its property and affairs shall be free from any custody or control of this Court except only to the extent herein otherwise provided. . . ."

By Paragraph XI-3 (R. 129) the proceedings were closed and the jurisdiction of the Court wholly terminated, except insofar as such jurisdiction had been expressly reserved. The decree nowhere reserved any control over the management or operation of the Reorganized Company. The only reservation at all touching this matter is contained in Paragraph XI-2 (O) of the decree which reserved jurisdiction (R. 129):

> "To consider and act on any questions respecting claims between the Reorganized Company and the Boston and Providence Railroad Corporation or its Trustee arising out of the provisions of the Plan herein relating to the Boston and Providence Railroad Company or arising out of the operation of the lines of the Boston and Providence by the Bankruptcy Trustees or the Reorganized Company."

This reservation certainly did not reserve to the Court control over the management or operation of

either the new company or of the Boston and Providence lines, and it is submitted that the assumption made by the Court below that those lines would continue to be operated "subject to such orders as the Bankruptcy Court may hereafter make pursuant to the jurisdiction reserved by the order on appeal" is clearly unjustified. At most this reservation was an attempt to reserve jurisdiction over *claims* resulting from operations and not of *custody* of the Boston and Providence or *control* over its operation. The Reorganized Company could not be "free from any custody or control" of the Bankruptcy Court in its future operations, and at the same time be an agent of the Bankruptcy Court in operating Boston and Providence.

Another erroneous assumption made by the Court below was that the Connecticut Court would have jurisdiction after the Consummation Order and Final Decree to change the New Haven Plan. Thus, the majority opinion (R. 216) states:

> "What effect, if any, it (disapproval of the Boston and Providence Plan by the Massachusetts Court) may have in requiring a modification of the Boston and Providence features of the New Haven Plan is for the Commission in the first instance and then for the District Court to determine."

The minority opinion also made the same erroneous assumption stating (R. 217-218):

> "As such a revised offer may perhaps necessitate a revision of the New Haven Plan, the court below had authority to retain jurisdiction of the

> New Haven to the extent necessary to permit that court to consider and pass upon an alteration in that Plan."

It is entirely clear, however, that the Court had no power after the confirmation of the New Haven Plan to change its terms. Indeed, the decree itself expressly negatived any attempt to reserve jurisdiction to do so. Paragraph XI 2 (q) of the decree (R. 129) provides that nothing in the reservation of jurisdiction "shall be construed as a reservation of jurisdiction to change the Plan, or any of the rights vested thereunder, or any of the rights of the holders of the new securities, or persons entitled to receive them".

Furthermore, Section 77 (f) of the Bankruptcy Act provides that "upon confirmation by the judge, the provisions of the plan and of the order of consummation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not as well as those who have, accepted it, and all creditors secured or unsecured . . ."

While it is true that the New Haven Plan and the Boston and Providence Plan contained reciprocal provisions, the provisions of the New Haven Plan, looking to an acquisition of the Boston and Providence properties, constituted merely an offer by New Haven subject to acceptance or rejection by Boston and Providence. The Boston and Providence Plan, as was pointed out to the Court below at argument, has been disapproved by the Massachusetts Bankruptcy Court, and the proceedings referred back to the Commission for further action. The New Haven Plan has now been consummated and no further

changes can be made in that plan, either by the Connecticut Court, or even by the Commission. Any changes in the terms proposed for the acquisition by the Reorganized Company of these properties must come, not by way of change in the New Haven Plan of Reorganization, but by voluntary action on the part of the Reorganized Company. Such action cannot be required either by the Court or by the Commission. The only power which the Commission now has over the Reorganized Company in this regard lies not in Section 77 of the Bankruptcy Act, but under the provisions of the Interstate Commerce Act.

The importance of having settled by this Court the respective powers and authority of the Bankruptcy Court and of the Commission in the circumstances here presented is illustrated by the fact that petitioner has now pending before the Commission two petitions filed under instructions of the District Court for the District of Massachusetts, one seeking that the Commission, under Section 5 (2) of the Interstate Commerce Act, fix and determine the terms and conditions for the operation of the Boston and Providence lines and properties from and after the consummation date of the New Haven Plan, including provisions for the payment of just and reasonable compensation for the use thereof,[3] and the other praying, in the absence of such determination by the Commission, for a certificate under Section 1 (18) of the Interstate Commerce Act authorizing the abandonment of the operation of said lines and properties by reason of the confiscatory losses claimed to have

[3] A prior application covering the same subject matter (R. 103-107) was dismissed by the Commission, without prejudice, on the ground that the application was filed prematurely in the light of the reservation of jurisdiction contained in the decree of the Connecticut Court (R. 184, 196).

resulted from Section 77 (c) (6) operation "for the account of the lessor".[4]

This Court has recognized that the power of the Commission under Section 5 (2) to fix terms and conditions is closely interrelated with its power under Section 1 (18) to authorize or refuse abandonment of operation. Thus, in *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134, 149, 150, the Court said:

> "The Commission has the power under section 1 (18) to refuse to allow abandonment of the operations. If it so refuses, trackage rights continue to be enjoyed by Brownsville. The question of what would be the amount of a fair rental to be paid by Brownsville would be highly revelant to a decision by the Commission on the issue of abandonment. We conclude that at least in that situation the Commission has the power under section 5 (2) to fix a reasonable rental for the use of the facility by Brownsville regardless of the consent of Tex-Mex. Denial of that power to the Commission is not required by the language of section 5 (2) (a). And this construction of section 5 (2) (a) is in harmony with the power of the Commission under section 1 (18) to refuse to authorize the abandonment of operations. If operations must continue, it is more consistent with this scheme of regulation for the Commission rather than courts or juries to determine the amount of the rental. * * * If, on the other hand, the Commission authorizes the operations

[4] Claims have been asserted against petitioner for such losses as prior lien claims for the period through December 31, 1946, in the amount of $12,446,512.62 (R. 206). The estimated losses for 1947, as set forth in respondent's brief in the Court below, amounted to $4,683,032.

to be abandoned, it 'may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require'. Section 1 (20), 49 USCA sec. 1 (20), 10A FCA title 49, sec. 1 (20). The Commission could permit abandonment unless Brownsville paid such reasonable compensation for the use of Tex-Mex's property as the Commission should fix."

If the decree of the Court below is permitted to stand, it would seem that the Commission would be without power to act upon petitioner's application to fix terms and conditions now pending before it. Its jurisdiction would be confined solely to action upon the abandonment application. But, as pointed out in the above case, the authority to abandon may be conditional upon the payment of such reasonable compensation for the use of applicant's property as the Commission may fix. It is submitted that in passing upon the abandonment application in the circumstances here presented, the Commission should not be shorn of its powers under Section 5 (2) of the Interstate Commerce Act, and that to do so would be highly inconsistent with the scheme of regulation of interstate carriers intended by Congress.

There can be no doubt that, in the absence of express statutory exception, a carrier subject to the jurisdiction of the Interstate Commerce Commission is prohibited from abandoning all or any portion of its operations without first obtaining a certificate from said Commission authorizing the abandonment.

Interstate Commerce Act, Section 1 (18);
Bankruptcy Act, Section 77 (c) (6);
Thompson v. *Texas Mexican R. Co.*, 328 U. S. 134.

It makes no difference that the operation is by Bankruptcy Trustees acting as agents of the Court, or that in fact no real abandonment is intended or effected. In *Smith* v. *Hoboken R. W. & S. C. Co.*, 328 U. S. 123, at page 130, this Court said:

> "In *Thompson* v. *Texas Mexican R. Co.* decided this day, (328 US 134, 66 S Ct 937) we held that a company having trackage rights over the lines of another must receive authorization to abandon the operations. That case is, of course, different from the present one because it entailed complete abandonment of operations by one company over another's lines. Here the question is whether the lessee or the lessor shall perform the service. But section 1 (18) provides that 'no carrier by railroad' shall abandon 'the operation' of all or any portion of a line without a certificate from the Commission. Discontinuance of operations by the trustee is abandonment of operations by a carrier within the meaning of section 1 (18). And a certificate is required under section 1 (18) whether the lessee or the lessor is abandoning operations."

There can also be no doubt that, in the absence of express statutory exception, a carrier undertaking to operate the properties of another carrier must first obtain the approval of the Commission, and the Commission is charged with the duty of fixing the terms and conditions under which such operations may be conducted.

> Interstate Commerce Act, Section 5 (2);
> *Thompson* v. *Texas Mexican Railway Company*, 328 U. S. 134.

An exception to this latter rule requiring the Commission to fix reasonable terms and conditions under which one carrier may operate the property of another, is found in Section 77 (c) (6) of the Bankruptcy Act wherein it is provided that, if a bankrupt lessee rejects the lease and the lessor is itself unable to operate, it shall be the duty of the lessee to continue to operate the leased properties until abandonment is authorized by the Commission. In this case Congress has determined the terms and conditions under which the operation shall be conducted, *viz,* "for the account of the lessor", and no one is given any discretion in the matter. As stated in *Warren* v. *Palmer,* 310 U. S. 132, 138, "This subsection modifies *pro tanto* the rule of the Interstate Commerce Act for operation." But Section 77 (c) (6) is a bankruptcy measure and, it is submitted, was designed to cover operation only during the period of the lessee's bankruptcy, or until the *earlier* authorization by the Commission of abandonment of operation. It is a temporary expedient to carry over the emergency occasioned by the lease rejection by the bankrupt lessee and contemplates that, prior to the termination of the reorganization proceedings, either approval by the Commission should be obtained for an abandonment, or terms and conditions be fixed by the Commission for a more permanent arrangement. The only power given by it to the Court is to decide whether or not it is impracticable for the lessor to operate. If it is, then the statute imposes a duty on the lessee and its trustees to continue operations for the account of the lessor until abandonment is authorized by the Commission. Any jurisdiction of the Court results from its being a custodial court whose trustees are charged with operating the former leased road. Thereby it ac-

quires an *in rem* jurisdiction over the operations by its trustees, and the adjudication of the results of such operation "so long as it continued to operate the road", *Warren* v. *Palmer,* 310 U. S. 132, 140, 141; but there its jurisdiction ceases. Neither *Warren* v. *Palmer, supra,* in declaring Section 77 (c) (6) to be a modification *pro tanto* of the Interstate Commerce Commission rule of operation, nor the language of Section 77 (c) (6) itself, gives the Court any jurisdiction over a transfer of operations from the lessee or its trustees to a new company which may emerge out of the reorganization proceedings, or to fix the terms and conditions of future operation by such new company.

Consideration must be given to the exact language of Section 77 (c) (6). It provides that under certain circumstances it shall be the duty of the *lessee* to continue operation on or for the account of the lessor until abandonment is authorized by the Interstate Commerce Commission. It is clear that the term "lessee" as used in the statute is broad enough to include operation by the Trustees of the lessee. *Warren* v. *Palmer,* 310 U. S. 132, 139. But it is the contention of petitioner that the term "lessee" is not broad enough to include a new corporation emerging from the reorganization. It is true that, in the instant case, the operations, after the entry of the decree appealed from, are being conducted by a carrier having the same name as the principal debtor, and, indeed, incorporated under the same charter, with certain amendments; but this is no more than a fortuitous circumstance. Under the terms of the New Haven Plan, the Reorganization Committee had an option either to use the existing corporation as a

vehicle for the consummation of the Plan, or to cause a new corporation to be formed for that purpose (R. 132). The Committee elected to use the existing corporation, but it is submitted that, for all intents and purposes, it should be considered a separate and distinct entity. The rights and duties of the parties in the premises, and the interpretation of the meaning of the statute, should not be dependent upon the election of the Reorganization Committee.

The cases of *Smith* v. *Hoboken R. W. & S. C. Co.* and *Thompson* v. *Texas Mexican Railway Company, supra,* did not involve the question here presented of whether the authority for operation under Section 77 (c) (6) of the Bankruptcy Act survives the termination of the reorganization proceedings. That precise question, it is believed, is one of first impression which has not been, but should be, settled by this Court. Petitioner contends that the force of that section is exhausted upon the termination of the reorganization proceedings, and it follows, under the authority of the above cases, that exclusive jurisdiction with respect to operations thereafter is with the Commission and not the Court. See also *Palmer* v. *Massachusetts,* 308 U. S. 79, 87, 88.

It is accordingly submitted that the Court below erred in affirming the decree of the Bankruptcy Court terminating the proceedings and discharging the Reorganization Trustees prior to the obtaining from the Commission of a certificate authorizing the abandonment of operation of the Boston & Providence properties under Section 1 (18) of the Interstate Commerce Act, and the approval of the Commission, and the fixing of terms and conditions for future operation, as provided in Section 5 (2) of said Act.

2. It is also the position of the petitioner that, even if Section 77 (c) (6) governed the operation of the Boston and Providence properties by the Reorganized Company after the termination of the reorganization proceedings, the Court below erred in affirming the District Court's reservation of jurisdiction to consider and act on any questions respecting claims between the Reorganized New Haven and the Boston and Providence, or its Trustee, arising out of the operation of the lines of the Boston and Providence by the Reorganized New Haven.

That the Connecticut Court had jurisdiction to adjudicate claims arising out of operation of the Boston and Providence properties by the New Haven Trustees during the pendency of the reorganization proceedings, and to impose a prior lien on those properties for losses incurred by said Trustees in conducting such operations was decided by this Court in *Warren* v. *Palmer,* 310 U. S. 132. That decision made it clear, however, that the jurisdiction of the Connecticut Court was an *in rem* jurisdiction and rested upon the fact that that court had custody of the property of the Boston and Providence. In that case this Court likened the jurisdiction of the Connecticut Court to that of a court which has custody of property or a fund, and thereby receives a corresponding power to require that expenses which have contributed to the preservation or creation of the property or fund shall be paid off before a general disposition of the proceeds to others entitled. At page 139, this Court said:

> "Thus a court having custody of a ship is able to secure wharfage by virtue of its power to decree a preferential payment. And here the

court is able to carry out the operation of the Boston and Providence by promising or granting a lien to those who carry out the operation."

At page 140, this Court concluded:

"In view of the public importance of rail service, we think this subsection represents an intention to give the court charged with operation the fullest ability to secure the necessities of operation—an intention to give the operating court power to promise those having the materials, men and equipment needed for operation a first lien on the road to secure payment for the operation. This ,in no way impairs the operation of Sec. 77 (a) which grants to the Massachusetts court, 'During the pendency of the proceedings under this section and for the purposes thereof,' 'exclusive jurisdiction of the debtor and its property wherever located.' The 'purposes' of sec. 77 include the development of a 'fair and equitable' plan of reorganization. The Massachusetts court is left with jurisdiction to accomplish this, but is bound to recognize the priority of the lien declared by the Connecticut Court. By sec. 77 (c) (6) the Connecticut Court was given jurisdiction *so long as it continued to operate the road* to grant a lien for operating expenses prior to any existing claims against the road." (Emphasis supplied.)

In the instant case, as above pointed out (pp. 12, 13 hereof), the Court nowhere reserved possession or custody of the Boston and Providence property, and it has no control over its operation. Since the Connecticut Court no longer has custody of the Boston

and Providence property, it no longer has jurisdiction to pass upon claims arising out of the operation of that property, or to impose a lien thereon for operating losses, and it cannot by judicial fiat extend its jurisdiction. It is submitted that this jurisdiction now lies with the United States District Court for the District of Massachusetts, which has "exclusive jurisdiction" of the property of the Boston and Providence "wherever located", under Section 77 (a) of the Bankruptcy Act.

It seems clear that the attempted reservation of jurisdiction by the Connecticut Court to pass upon claims between the Reorganized Company and the Boston and Providence arising out of the operation of the lines of the Boston and Providence by the Reorganized Company cannot be justified as being made in order to protect its decree, or the execution of the plan, or to aid otherwise in its operation. On the contrary, it is obviously an attempt to retain power to adjudge the rights and liabilities of the Reorganized Company arising out of subsequent transactions between it and third persons and, accordingly, beyond the authority granted by Section 77 (f) to the reorganization court. *Towers Hotel Corp.* v. *Lafayette National Bank,* 148 F. 2d 145; *Bakers Share Corp.* v. *London Terrace Inc.,* 130 F. 2d 157.

As stated by Judge Franks in his dissenting opinion (R. 219), the jurisdiction of the Connecticut Court should not be held to extend to the adjudication of claims arising out of the operation of petitioner's lines by the reorganized company—

> "*any more than if the New Haven Plan had contained an offer to an independent railroad,*

never theretofore operated by the New Haven, for the acquisition of that independent railroad's properties.

The 'reservation' is objectionable, I think, not because it aims to keep the New Haven 'in tutelage' but because it reaches out to control and puts 'in tutelage' another railroad whose reorganization and property—dispositions are not the business of the court below."

The following remark made by the same judge in the footnote to his dissenting opinion (R. 219) aptly illustrates the incongruous result arrived at by the decision of the Court below:

"As I understand my colleagues' opinion, 'retention' of jurisdiction over such claims is to continue until the B&P accepts the present offer or some better offer or until negotiations for the acquisition of the B&P lines have ended in a rejection of any offer whatever. That point may not be reached for years."

CONCLUSION.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Excerpts from Interstate Commerce Act as Amended

Interstate Commerce Act, Section 1 (18):

"*Extension or abandonment of lines; certificate required.*—No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter, shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment. . . ."

Interstate Commerce Act, Section 5 (2):

"*Mergers; applications; approval.*—(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate

ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise. . . .

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission. . . . If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable. . . ."

EXCERPTS FROM SECTION 77 OF THE BANKRUPTCY ACT AS AMENDED

BANKRUPTCY ACT, SECTION 77 (a):

". . . If the petition is so approved, the court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have

had if it had appointed a receiver in equity of the property of the debtor for any purpose. . . ."

BANKRUPTCY ACT, SECTION 77 (c) (6):

"*Operation of road after rejection of lease.*—If a lease of a line of railroad is rejected, and if the lessee, with the approval of the judge, shall elect no longer to operate the leased line, it shall be the duty of the lessor at the end of a period to be fixed by the judge to begin the operation of such line, unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized by the Commission in accordance with the provisions of section 1 of the Interstate Commerce Act as Amended."

BANKRUPTCY ACT, SECTION 77 (f):

"*Confirmation and carrying out of plan.*—Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it. Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the

purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding. The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Upon confirmation of a plan the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of the Interstate Commerce Act as now or hereafter amended. . . ."